

26th November, 1762.

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Unto the Right Honourable the Lords of Council and Session.

T H E
P E T I T I O N
O F T H E

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Magistrates and Town-council of *Stirling*,
Michael Potter of *Easter-Livylands*,
John Galloway Elder, and *Robert Gal-*
way Younger, of *Burrowmeadow*,

Humbly sheweth,

THAT *Thomas Erskine* of *Alloa*, commonly called Lord *Erskine*, and *John Erskine* of *Balgownie*, for themselves, and in Name and Behalf of the whole other Heretors, having Right to Salmon-fishings upon the River *Forth*, but without any Authority from these other nameless Heretors, or without producing any of their Title-deeds, brought a Declarator in this Court, whereby, *inter alia*, they insisted to have it found and declared, that they, the Pursuers, as having Right to certain Salmon-fishings upon the River *Forth*, are thereby entitled to fish within the aforesaid Bounds with Pock-nets, Stroup-nets, Cobles, and other Nets or Engines not expressly discharged by Law; and that they ought not to be disturbed or molested in the Premises by the Defenders.

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The Title-deeds referred to in this Summons, on the Part of *Thomas Erskine* of *Alloa*, were a Charter of the Earldom of *Marr* in 1699 in Favours of *John* late Earl of *Marr*; and the said *Thomas Erskine*'s own Charter in 1741, proceeding upon a Disposition from Lords *Dun* and *Grange* as Purchasers of said Earldom from the Commissioners of the forfeited Estates; and under these and the more ancient Title-deeds of the Family of *Marr*, as derived from the Abbots of *Cambuskenneth* and *Inchmaholm*, *Thomas Erskine* pretends to have Right to the whole Salmon-fishings upon both Sides of this River, from the *Abbey Boat* to the *Carron Mouth*, that is for about the Space of 25 Miles of Water.

The Title produced for the other Pursuer, *John Erskine* of *Balgownie*, was a Contract in 1598 between *John* Earl of *Marr* and *John Erskine* of *Little Sauchie*, whereby the Earl disposed the Lands of *Poppletrees*, with a Stoup-net-fishing upon the Water of *Forth*, in the Place used and wont within the Bounds of said Lands, to which Contract Mr. *Erskine* of *Balgownie* pretends to connect a Right.

The foresaid Summons contains various other declaratory Conclusions respecting these Salmon-fishings; but the Dispute has hitherto been confined to this single Point, Whether the Pursuers, supposing them to be entitled to one or more Salmon-fishings upon this River, can make Use of Herry-water-nets, Pock-nets, or Stoup-nets.

The Petitioners, by their Charters and Infeftments, have an indisputed Right to Salmon-fishings within their respective Bounds in the superior Parts of this River; and have thereby a patrimonial Interest to advert that no Abuses be committed by those who have, or pretend to have, a Right to the inferior Fishings, hurtful or prejudicial to the general Salmon-fishing of said River.

And for them it was contended, that supposing the Pursuers to have a general Right of Salmon-fishing within the
Bounds



Bounds libelled, it was not allowable for them to exerce that Right by making Use either of Herry-water-nets, Pock-nets, or what is now called Stoup-nets ; for that the two first mentioned Species of Nets, viz. the Pock-nets, and Herry-water-nets, and every other Engine or Device whatsoever, not expressly allowed by Law, stood expressly prohibited and discharged by the third Act of Parliament 1698: That what was now called the Stoup-net, was in reality no other than a Pock-net of a larger Size, consequently more destructive to the general Salmon-fishing of this River; tho', in order to elude the Law, they were now distinguished by the Name of a Stoup-net: That they were but of modern Invention ; and that the Sheriff of *Stirling*, to whom the Execution of the aforesaid Law was committed, and who was thereby specially enjoined, upon his Peril, to suppress these Methods of Fishing, to destroy the Nets and punish the Offenders, had till of late Years been particularly attentive in the Execution of this Part of his Duty.

It was on the other Hand pleaded for the Pursuers, that as the aforesaid Act of Parliament had been procured by the Moyer of the then Earl of *Marr*, and of some of the other Heretors having Right to Salmon-fishings on this River, it could not be the Intention of the Law to restrain them in the Exercise of their Property in the most beneficial Manner: That the declared Purpose of the Law was, to restrain these Kind of Fishings, so far only as prejudicial to the Interest of the Heretors who had Right to these Fishings ; and therefore, that however general the Words were, they ought not to be construed to impose any Restraint upon the Heretors themselves, but allenarly to restrain Interloppers who had no Right to fish on said River. 2dly, That however the Prohibition might comprehend Herry-water-nets and Pock-nets, it could not be extended to Stoup-nets, which were a different Species of Nets, and the Fishing with these used in a different Manner,

ner, than was formerly practised with regard to the Pock-nets.

The Lord *Coalston* Ordinary took the Debate to report, and Informations were exhibited; but as Parties differed in their State of Facts, as to the following Particulars: *1st*, Whether the Users of these Nets, Pock-nets as well as Stoup-nets, had been in Use to be prosecuted for this their supposed Offence, and the Nets destroyed. *2dly*, Whether the Stoup nets were in reality but an improved Species of Pock-nets, however diversified in the Name, or a different Species of Fishing, and therefore not falling under either the general or special Prohibition. *3dly*, When these Machines, called the Stoup-nets, were first invented and put in Practice. Your Lordships, after receiving the Report and a good Deal of Reasoning upon the Case, by Interlocutor, 3d *December*, 1760, “ Remitted the Cause to the Lord Ordinary to call and hear Parties thereon, to enquire into the Facts, and to do therein as he should see Cause.”

In Pursuance of this Remit, and in Obedience to the Lord Ordinary's Appointment, Condescendences were exhibited, upon the Part of the Petitioners, of the Facts which they averred and offered to prove, consisting of the following Particulars.

1st, That the Sheriff of *Stirling* had been in the constant Practice, since the Date of the aforesaid Act of Parliament, of restraining the aforesaid prohibited Manner of Fishing with Pock-nets, and of punishing the Users without Distinction: And more particularly, that Heretors, having Rights of Salmon-fishing, have been prosecuted for giving Countenance to People who fished with Pock-nets; and that Tenants of other Heretors within the foresaid Bounds, pretending Rights to a Fishing by their Tacks, were likewise prosecuted for this Method of Fishing.

2dly, That the Stoup-nets presently used (and which the Petitioners had formerly averred to be no other than an improved

proved Pock-net, more pernicious to the Fishing in general) were first invented and introduced about the Year 1739 ; and more particularly, that the first of these Nets was a Contrivance of one *William Buchan*, executed under his Direction by a Wright in the Neighbourhood, the obvious Purpose and Intendment of which was, by the Change of the Name, and a very little Variation in the Form of the Net, to elude the Law.

3dly, That upon repeated Complaints against the Users of these Stoup-nets, the Sheriff gave Judgments, and punished the Offenders in the same Manner as he had been in Use to do with the Users of Pock-nets ; particularly in the Year 1740, when *Thomas Buchan* Tenant in *Bandeath*, being complained of for using the Stoup-net, having pleaded his Right to a Salmon-fishing by virtue of his Tack from the Proprietor, his Defence was repelled, and Judgment given against him.

4thly, That from the Date of the aforesaid Act of Parliament, until of late, that the Stoup-nets were introduced, the general Method of Fishing, after Suppression of the Pock-nets, was with long Nets and Cobles.

5thly, That the Number of Stoup-nets, now used by the Pursuers and their Tenants, is much greater than the Number of long Nets formerly used by them.

6thly, That this Method of Fishing by the Stoup-nets is much more destructive to the Fishing in general upon this River, than the Fishing either with the Pock-nets or the long Nets was, there being now above 200 of these Nets used within the Bounds, where formerly not above 12 long Nets were used.

7thly, That there was no other Obstruction to fish with the long Nets as formerly, than that possibly several Stakes, drove into the Bottom of the River, by the Users of the Stoup-nets, for the Purpose of that Fishing, have been carelessly allowed to remain in the Water.

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8thly,

8thly, That as a much greater Number of Hands was necessary for the fishing with these Stoup-nets, the labouring Men in the Country round about applied themselves to the Fishing, whereby there arose a Penury of Servants and Day-labourers in the Neighbourhood, and a considerable Increase of their Wages.

Upon advising said Condescendence, with the Answers thereto made on the Part of the Pursuers, the Lord Ordinary, by Interlocutor 19th *February* 1762, “ Allowed the Defenders
“ a Proof of the Facts contained in their Condescendence,
“ and the Pursuers a Proof of the Facts contained in their
“ Answers, and both Parties a conjunct Probation thereanent,
“ and of every other Fact and Circumstance which either Party
“ might judge material for them in the Cause, and granted
“ Commission, &c.”

And upon advising a Representation for the Pursuers, his Lordship, by Interlocutor 9th *March* 1762, “ Before Answer,
“ ordained the Pursuers to confess or deny, 1mo, If the Stoup-
“ nets, which are presently used, are not of modern Inven-
“ tion, introduced within the Space of 20 or 30 Years last
“ past; and to condescend specially, what they know or be-
“ lieve as to the Time when they were first introduced. 2do,
“ If the Pursuers were not formerly in Use of fishing with
“ Cobles and long Nets, in the same Parts of the River
“ where they now use Stoup-nets, and if the Bottom of the
“ River is not such, that it may be advantageously fished
“ with Cobles and long Nets. 3tio, If the Number of Stoup-
“ nets, presently used by the Pursuers and their Tenants, is
“ not much greater than the Number of long Nets formerly
“ used by them, and what might be the Difference in Point
“ of Number. 4to, If the Method of fishing by Stoup-nets,
“ as it is now practised, is not more profitable, and if more
“ Fishes are not caught in that Way than when the Practice
“ was to fish with Cobles and long Nets. 5to, If the Method
“ of

“ of fishing by Stoup-Nets does not employ a greater Number
 “ of Hands than what was formerly necessary for fishing with
 “ Net and Coble; and if there are not a greater Number of
 “ Persons employed in the Pursuer’s Fishings than formerly
 “ when the Practice was to fish with Cobles and long Nets;
 “ and if the Fishers do not make higher Wages by fishing
 “ with Stoup-nets.”

The Answers which the Pursuers made to the above Particulars were general and evasive; with all which the Lord Ordinary having made Avisandum to himself, he pronounced the following Interlocutor, 13th November 1762, “ Having
 “ considered the Memorials and Informations formerly given
 “ in for both Parties, with the Remit by the Lords, Condescendences for the Defenders, and Answers for the Pursuers, finds the Facts contained in the Condescendence not
 “ relevant. And further finds, That the Act of Parliament
 “ 1698, was not mean’d to regulate the Manner in which
 “ Heritors, having Right to fish in the River of *Forth*, were
 “ to exerce their Right of Fishing, but only to restrain Interlopers, who had no Right to fish, from fishing to the
 “ Prejudice of the Heritors; and therefore, and in respect
 “ that no Law prohibits Heritors, who have Right to fish,
 “ from fishing with Pock-nets or Stoup-nets, finds and declares, That it is lawful for the Pursuers to fish with Pock-nets and Stoup-nets, and with every other Engine not prohibited by Law.”

This Interlocutor, of which the Petitioners are now humbly to complain, returns the Cause to your Lordships in the same Shape it stood when originally reported, with this only Difference, that the Lord Ordinary has been pleased to refuse a Proof of these Facts, as contraverted between the Parties, which occasioned the Remit, and which, the Petitioners take the Liberty to insist, are material to the Cause in the following Respects; 1st, For explaining in what Sense the aforesaid
 Act

Act of Parliament has been understood by all Parties concerned in these Fishings. 2^{dly}, For evincing that the Stoup-nets, as now used, are but of modern Invention to elude the Law, being in reality no other than an improved Pock-net, more destructive to the Salmon-fishing of this River, and as such discharged both by the general and special Prohibition in the aforesaid Act of Parliament.

And, in the Entry, it may be proper to observe, that as Salmon-fishings are *inter regalia*, though not inseparably annexed; and though the Bulk of these have past into private Property, by Grants from the Sovereign; yet as the general Right remains with the Crown, and has been the Object of the Legislature's Attention from the earliest Periods, so by the several Statutes in that Behalf made, Care has been taken to restrain and suppress every Abuse in the Exercise of that Right, which was deemed to be hurtful to the Salmon-fishing in general.

It was in this View that so many Laws became necessary, to restrain the Killing of Salmon in particular Seasons, that the Fish might be left undisturbed, to pass from the Sea up the Rivers, to deposite their Spawn, and the young Fry to come down to the Sea.

Thus also the Killing of Smolts and young Fry, by so many different Instruments of Destruction as were used for that Purpose, was prohibited and discharged under severe Penalties.

For the same Reason Cruives and Zairs in the Mouths of the Rivers, or within the Flowing of the Sea, were repeatedly discharged, ordered to be pulled down, and made Points of Dittay; and even in fresh Waters, where Cruives had been established, they were ordained to keep the *Saturday's Slap*, whereby the larger Fish might have Access to go up the River, and the Hecks to be of such Wideness, that the smaller Fish might pass and repass at all Times.

Thus

Thus also Herry-watet-nets, and various other destructive Instruments, were from Time to Time prohibited, sometimes by general Statutes respecting the whole Salmon-fishings in *Scotland*; at other Times by local Statutes, respecting the Abuses committed in particular Rivers.

And thus it was, that whereas an abusive Practice had prevailed in the upper Part of the River *Forth*, above the *Pow* of *Alloa*, of fishing with Herry-water and Pock-nets, which by Experience had been found to be pernicious to the general Salmonfishing upon that River, and which, in so far as the Petitioners are informed, is not practised upon any other River in *Scotland*, where the Salmon-fishing is of any Value or Consequence, the aforesaid Act of Parliament was past in 1698, “ Whereby his Majesty, with Advice and Consent of the “ States of Parliament, prohibits and discharges all Salmon- “ fishing, or other Fishing whatsoever, in the River *Forth*, “ above the *Pow* of *Alloa*, on both Sides of said River with “ Pock-nets, Herry-water-nets, or other Engines or Devices “ whatsoever, not expressly allowed by Law, and to the Pre- “ judice of the Heretors, and their Rights of Salmon fishing “ on the said River; and impowers, warrants, and commands “ the Sheriff-principal of the Shire of *Stirling*, Bailie of the “ Water of *Forth*, and his Deputes, to suppress the foresaid un- “ lawful and prohibited Manner of Fishing, and punish the Users “ of the foresaid Pock-nets, Herry-water-nets, and other unlaw- “ ful Engines, by fining, not exceeding the Sum of 20*l.* Scots, “ roties quoties, or Imprisonment, as they shall see Cause; and “ to destroy all the foresaid unlawful Engines; and that this they “ do as they shall be answerable.”

What may have been the Legislature's Motives or Considerations for confining these salutary Regulations to the River *Forth*, or by whose Moyer this Law was procured, does not belong to the Petitioners to say, further than as it may reasonably be supposed, that as the Fishing with these Instruments

of Destruction was more practised in this than in any other River in *Scotland*, and was by Experience found to be hurtful to the general Fishing upon said River, all those who had Interest therein did concur in applying to Parliament for this Law, or acquiesced therein after it was past, without once complaining thereof.

From the whole Strain of the Act it is obvious, that as the particular Engines therein mentioned, *viz.* the Herry-water-nets, and Pock-nets, were thereby condemned and prohibited as unlawful Engines, so it was made a Point of Dittay for any Person whatever, to fish within the aforesaid Bounds, with these particular Instruments. It was that Species or Manner of Fishing which the Law condemned, and was so anxious to enforce the strict Observance of it, that the Sheriff and his Deputies were not only authorised, but commanded, upon their Peril, to advert to the strict Execution thereof, to punish the Transgressors by Fines or Imprisonment, and to destroy the Engines themselves, again characterised unlawful.

Such being the Complexion of the aforesaid Statute, not of such ancient Date as to have gone into Disuse, and which has been enforced from Time to Time, by repeated Prosecutions before the Sheriff, Judgments-condemnator thereupon pronounced, and destroying of the Nets; your Lordships will attend to these four Particulars, clearly expressed, which therefore can admit of no Ambiguity; 1st, That these Engines are declared unlawful, and condemned as such. 2^{dly}, That the Species of Fishing, by Means of these Instruments, is prohibited and *simpliciter* discharged. 3^{dly}, That all and every Person or Persons using the same, are declared Delinquents, and to be punished as such. 4^{thly}, That the Engines themselves being condemned as unlawful, are appointed to be destroyed, without any Exceptions, or Distinction of Persons; which therefore clearly shows, that the Law was directed *in rem*, and against the Persons only as guilty of using these Engines, and that Species of fishing thereby condemned.

It would appear that the Legislature did foresee what or later Years has proved to be the Fact, *viz.* That Attempts might be used to evade the Law in these Particulars, by making Use of other Instruments of the same Kind, to carry on the same Species of Fishing; and therefore, not satisfied with condemning the particular Engines then used, *viz.* the Herry-water-nets, and Pock-nets, the Prohibition was extended to every other unlawful Engine, not expressly allowed by Law.

And that that is the Case, tho' the Words of this Statute had been less comprehensive than they are, as the Legislature had it obviously in view to protect the Fishing of this River from being destroyed by these or such like Engines, as well these expressed as not expressed, it is *pars judicis* so to explain, and if necessary even to extend the Law by Construction, that it may not be rendered elusory, or the good Intentions thereof evaded. *Non possunt omnes articuli sigillarim, aut legibus, aut senatus-consultis, comprehendere; sed cum in aliqua causa, sententia eorum manifesta est, is qui jurisdictioni præest, ad similia procedere, atque ita jus dicere, debet.* Nam, ut ait Pedius, *quoties lege aliquid unum vel alterum introductum est, bona occasio est cetera que tendunt ad eandem utilitatem, vel interpretatione, vel certa jurisdictione, supplere.* These are the Rules laid down, as a Direction to Judges in their Procedure in the Construction or Interpretation of the Laws, in L. 12 and 13 *de leg.* It would be in vain for the Legislature, in Cases of this Kind, to enact prohibitory Laws for public Utility, if, by changing Names, or some little Alteration in the Form of the Engine, to render them more destructive, this should be deemed sufficient to exeeem them from the Sanction of the Law.

The Execution of this Act of Parliament being strictly attended to for a Course of Years, had the Effect so totally to suppress these Herry-water and Pock-nets, that there was not such a Thing known to be made Use of upon this River, if it was

was not sometimes by Stealth, that Tenants and others residing upon the Banks of the River ventured to transgress, by using the Pock-net, for which, as often as discovered, they were prosecuted. These being suppressed, the Cobles and long Nets came in Play, till of late Years, that the Pock-nets were revived, and a larger Species of these invented, which they dignified with the Name of Stoup-nets, with a view to evade the Act of Parliament, in case they should be challenged, and which accordingly have been the Subject of repeated Prosecutions before the Sheriff, and productive of sundry Commotions and Deforcements of the Officers of the Law in that Part of the Country.

In order to silence these Prosecutions before the Sheriff, this Process of Declarator was brought ; and the general Question thereupon arising, is, Whether the Pursuers, supposing them to have Right to Salmon-fishings, one or more upon this River, above the Pow of *Aloa*, are intitled to fish with Herry-water-nets, Pock-nets, or Stoup-nets ?

The Defence *quoad* the two first rests upon the explicit Condemnation of these two Engines, by Name, in the aforesaid Act of Parliament ; and *quoad* the Stoup-net, not only from the general Words subjoined to the above Particulars, whereby all other Engines, not expressly allowed by Law, are prohibited ; but more particularly, for that the Stoup-nets now used, are in reality no other than Pock-nets of a larger Size, as will appear to your Lordships, by comparing the Patterns of the two lying in Process, and the Method of Fishing with these, by which it will be evident, that these Stoup-nets are in reality no other than larger Pock-nets, and in the Way they are used, more pernicious and destructive than even the Herry water-nets, as no Fish swimming up the River can pass by, but are either caught, or scared, and forced back to the Sea.

The general Description which the Statute gives of that
Species

Species of Net thereby condemned, is its being a Pock; so that whatever Alterations may be made in other Respects, if it is in the Shape of a Pock in which the Fish are caught, it falls under both the Words and Intendment of the Law.

The Method formerly practised in fishing with the Pock-nets of a triangular Figure, was, that a Number of Persons having these in their Hands, stand across the Stream of the River, where they know the Salmon must pass; and these being so many in Number as to cover the whole Stream, it was scarce possible for any Fish coming up the River to get by; for if he struck upon one of these Nets, he was either caught by raising the Mouth of the Pock, or if he escaped, was forced to take his Course down the River again, as he could not get up.

The Stoup-nets are also Pock-nets; but being of a larger Size, and therefore not so easily managed, the Method practised in Fishing with them is, that a Rope is streached across the River, and Boats, to the Number of six or eight appended to this Rope, each Boat containing two Men, having each of them a Net, which Nets are put into the Water, fourteen or fifteen Feet deep; whereas, the common Pock-net could not be used in Water above four Feet deep: When the Fish strikes in any of these Pocks, the Person who holds the Pole pulls it directly up, so that it's the meekest Chance if any one Fish can get up. They make a complete Fence across the Stream of the River, and nearly approach to so many Cruive Dykes, of which there are at least ten or a Dozen, between the *Pow* of *Alloa*, and the Petitioners Fishings.

The ~~Petitioners~~ ^{Declarators} found their Declarator upon these three Propositions: 1st, Upon their having Right to a Salmon-fishing in this River, which entitles them to use the same in the most beneficial Manner, and by such Instruments as are most for their Interest which are not prohibited by Law; and that the Heretors of the Superior fishings have no Title to controul them in the Exercise of their Right. 2^{dly}, That the

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Statute

Statute 1698, was not intended to restrain Heretors having Right to Fishings upon that River, from using these or any other Engines they pleased: That the Purpose of the Act was, to favour the Interest of those Heretors, by prohibiting Strangers and Interlopers, who had no Right to any fishing upon this River, from fishing therein with these particular Instruments, as prejudicial to the Heretors having Right to the Salmon-fishings; and therefore that the Prohibition to use these particular Engines should be so construed, as to prohibit the Use of them only to these Intruders, but by no Means to restrain the Heretors themselves from fishing in the most beneficial Manner within their respective Bounds, as it cannot reasonably be supposed, that the Earl of *Marr*, and the other Heretors, who procured this Act of Parliament, could mean to put such a Restriction upon themselves. 3dly, That supposing the Prohibition could be effectual *quoad* the Herry-water-nets and Pock-nets, it would not strike against the Stoup-nets, as being a different Engine from the Pock-nets.

This last was what the Petitioners did chiefly propose to clear up by the Proof, tho', as the Pursuers do not seem to dispute either the Form and Figure of these Nets, or the Method of fishing with them as above described, it may with Reason be thought that no further Proof is necessary. But as the Lord Ordinary has been pleased to rest his Judgment upon the Construction of the Act of Parliament itself, it is to that Point which the Petitioners are chiefly to apply themselves.

Whether the Earl of *Marr* may have been the Person entrusted by the Heretors to negotiate this Act of Parliament, is to the Petitioners unknown. That it must have been by the general Consent of the whole Heretors, is highly presumable, as the Prohibition extends to them all equally, and was never complained of, but universally acquiesced in, for a long Course of Years, and a new Species of fishing by the Coble and Long-net set on Foot, in place of those condemned and suppressed.

It is as little to the Purpose, whether these Regulations were salutary or not ; or whether it might not be more expedient that they were now repealed. The Legislature judged them salutary when they were past into a Law, and the general Acquiescence they met with, shows how much they were approved of. If Matters are now changed, and if what was then profitable is now become unprofitable or inexpedient, the same Authority that established the Law can release it. But while the Law stands, your Lordships will certainly think yourselves bound to protect it from being either evaded, or avowedly infringed ; and as the Statute makes no Distinction between one Person and another, the Exception which is here contended for, has plainly no Warrant or Authority from the Law itself, which condemns the Engines themselves, declares them unlawful, and prohibits that Species of Fishing ; punishes the Users of such Engines by Fines and Imprisonments, and commands the Sheriff, upon his Peril, to advert to the Execution of the Law in all and each of the above Particulars, and to destroy these unlawful Engines without Exception or Distinction of Persons.

The Gloss which the Pursuers have been pleased to put upon this Prohibition, as intended only to strike against Foreigners and Interlopers, not against the Heretors themselves, who had Right to Salmon Fishings upon this River, is, with all due Submission, repugnant both to the Words and Spirit of the Law. It would be involving the Law in a manifest Incongruity, to suppose, that the Legislature could mean to prohibit those *only* to fish with these unlawful Engines, who had no Right to fish with any Engine whatever, not the most lawful, within these Limits.

The very Reverse of this is plainly the Case. It was these only who had a Right to fish that could be supposed capable of abusing that Right, by fishing with these destructive Engines ; and therefore, it was them only that the Law could intend

tend to discharge from exercising that Species of Fishing, or making Use of these particular Engines. The Prohibition would have been superfluous against such as had no Right to fish in any Manner whatever ; on the contrary, it supposes a Right, and an Abuse of that Right, from the Damage done to the general Fishing of this River, by making Use of such Instruments. The Injunction is *in rem* against that particular Species of Fishing, and against the Instruments themselves, as declared by the Statute to be unlawful, not against any particular Persons. Had that not been the Case, the Act must have been conceived in very different Terms.

And what serves to put this Matter beyond all Doubt, is the general Acquiescence in that Construction of the Statute which was immediately followed by a general Suppression and Disuse of these Instruments, by the whole Heretors having Right to a Salmon Fishing in this River, and their Tacksmen and their betaking themselves to the Coble and long Net, in which Method they continued to fish, till of later Years, that the Pock-net Fishing was revived under the Name of Stoup Nets.

The Pursuers whole Argument upon this Point rests upon these Words of the Law, *and to the Prejudice of the Heretors, and their Rights of Salmon Fishing in the said River*, as importing a Restriction of the general Prohibition, so as to operate no further than the Interest of the particular Heretors was concerned, which therefore could not be intended to restrain the Heretors themselves from fishing in whatever Manner they thought proper.

But the Petitioners submit it to your Lordships, that this Limitation is repugnant both to the Words and Spirit of this Act. For how is it possible to conceive, that it could be the Intendment of the Law, to authorise the Heretors, having Right to Salmon-fishings in that Part of the River, and against whom therefore the Prohibition could only be intended, to make Use of Engines which the same Act declared to be unlawful,

lawful, ordered to be suppressed, and made the using of them a Point of Dittay. The fair Construction of these Words imports no more, but a Declaration of the Legislature, that the making Use of such Engines was prejudicial, not to the Interest of particular Heretors, but of the whole Heretors having Right to Salmon-fishings in said River. That was the Object of the Legislature's Attention, and the Regulations thereby established were calculated to attain that salutary End without Distinction of Persons.

Taking it therefore for granted, that Herry-water-nets and Pock-nets stand prohibited and discharged to be made Use of in this Part of the River *Forth*, the other Point that remains for your Lordships Consideration is, whether the Nets that are now used under the Denomination of Stoup-nets, fall under either the particular Prohibition of Pock nets, or under the more general Words of *other Engines or Devices whatever, not expressly allowed by Law*.

Stoup-nets is a Species of Fishing, which, in so far as the Petitioners can discover, are not to be found in any of our Law-books, or in any of the various Acts of Parliament respecting the Salmon-fishing, and therefore cannot with any Propriety be said to be *expressly allowed by Law*; and as it was clearly the Intendment of the Statute, by these general Words, to prohibit every Device and Subterfuge, whereby the former special Prohibition might be evaded, if your Lordships, by comparing these Stoup-nets with the Pock-nets, and the Manner of Fishing practiced by both, shall clearly perceive, that what is now denominated the Stoup-net, is in reality a Pock-net, enlarged and improved to render it more destructive, and consequently more adverse to the Spirit and Intendment of the Statute, you will certainly never suffer it to be evaded in this Manner. The Pursuers are here copying after the known Practice of Gaming-houses in our neighbouring Country, who, to elude the Laws suppressing this or the other species of Gaming-tables, make a

new Edition of the same, with some trifling Variation, and give it a different Name, as by changing the Letters A. E. to I. O.

The Pursuers were pleased to observe, that by the Contract 1598, *John Earl of Marr* conveyed to *Erskine of Little Sauchie* the Lands of *Poppletrees*, with a Stoup net-fishing upon the Water of *Forth*, which they offer for Evidence, that this Species of Fishing must then have been known; from which they draw this Inference, that it must be presumed to have been the same Species of Fishing which is now practiced.

But this is what your Lordships can never presume merely from the Name. For tho' the Petitioners cannot take upon them positively to say, what Species of Fishing may have been intended by these Words of the Contract 1598; it's highly presumable, that what was therein denominated a Stoup-net, was identically the same with the Pock-net, as no other Species of Fishing of that Kind appears to have been known previous to the Statute 1698, when the Pock-net-fishings were suppressed, and the Stoup-nets, already explained, and not controverted, to be of such modern Invention, that the Petitioners have condescended upon the very Person by whom the first of these was contrived, after that the Pock-nets had stood suppressed for such a Course of Years. And as your Lordships have seen, from the Description of the two Nets, that they are both Pock-nets used in the same Manner, with this only Difference, that the Stoup-nets carry a larger Pock, and therefore require more Hands, and the Assistance of Boats to manage them, it's humbly submitted, whether they do not fall both under the special and general Prohibition in the foresaid Statute.

May it therefore please your Lordships to alter the Lord Ordinary's Interlocutor, and to find, that the Statute 1698, which is a subsisting Law at this Day, did prohibit

prohibit and discharge the using Herry-water-nets, or Pock-nets, thereby condemned as unlawful Engines upon this Part of the River, by all Persons whatever, without Distinction; and therefore, that it is not allowable for the Pursuers to make Use of these Engines, in the particular Fishings to which they pretend to have Right; and seperatim to find, that the Stoup-nets now used, fall under the aforesaid Prohibition, both special and general, as being but a Device to elude the Law.

According to Justice, &c.

ALEX. LOCKHART.

ALICE LOCKHART